

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 June 2004

CASE NO.: 2004-SOX-00035

In the Matter of:

KRISHNA REDDY,
Complainant

v.

MEDQUIST, INC.,
Respondent

RECOMMENDED ORDER OF DISMISSAL

Background

This case arises out of a complaint of discrimination filed pursuant to the employee protection provisions of §806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes Oxley Act (“the Act”), 18 U.S.C. §1514A, enacted on July 30, 2002. The Act prohibits retaliatory or discriminatory actions by publicly traded companies against their employees who provide information to their employees, a federal agency, or Congress that alleges violations of 18 U.S.C. §§1341, 1343, 1344 or 1348, or any provision of Federal law related to fraud against shareholders. 18 U.S.C. §1514(a).

On December 30, 2003, Complainant, Krishna Reddy, filed a complaint before the Occupational Safety and Health Administration of the U.S. Department of Labor (“OSHA”), alleging that her employer, Medquist, Inc., terminated her in violation of the Act. Complainant contends the termination resulted from complaints to management regarding Respondent’s manipulation of the line count in its documents causing transcriptionists to lose income. Complainant alleges she was later retaliated against, when her contract was not renewed.

On January 16, 2004, the Regional Administrator dismissed the complaint finding it was lacking in prima facie elements, specifically a recognized protected activity. The Regional Administrator determined Complainant’s complaint to management expressed concerns regarding an internal company policy and its alleged deleterious impact on the rate of pay for medical transcriptionists. Furthermore, there was no prima facie evidence to suggest the alleged violations represent proscribed acts within the meaning of the Act. The determination letter further instructed Complainant that she had 30 days from receipt of the findings to file objections and request a hearing.

On March 4, 2004, Complainant filed an appeal with the Office of Administrative Law Judges ("OALJ"). The matter was docketed in the OALJ and assigned to the undersigned. On March 18, 2004, the undersigned issued a Notice of Hearing and Prehearing Order scheduling a hearing date of April 15, 2004. The order instructed Complainant to file a prehearing statement within three days of receipt of the Order.

On April 12, 2004, Complainant filed an Application for Leave to File Complainant's Prehearing Statement. Complainant requested permission to file the prehearing statement alleging she did not receive the Notice of Hearing until April 9, 2004. Complainant's prehearing statement was attached to the Application.

On April 14, 2004, Respondent filed a Motion to Dismiss Complainant's administrative appeal. Respondent argued for dismissal of the complaint based on Complainant's failure to comply with the Department of Labor's March 18, 2004, Prehearing Order and Complainant's failure to state a claim under the Act.

On April 15, 2004, a hearing on this matter occurred. The undersigned agreed to take Respondent's Motion to Dismiss under submission. A briefing schedule was set requiring Complainant to file a response to Respondent's Motion to Dismiss on or before April 30, 2004. Respondent was to file any reply to Complainant's Response on or before May 14, 2004. Thereafter, Complainant had until June 1, 2004, to file any further response to Respondent's Motion. On April 28th, the undersigned issued a Notice rescheduling the hearing to June 14, 2004.

Complainant's Opposition to Respondent's Motion to Dismiss and Cross Motion for Judgment for the Complainant was received on May 3, 2004. Respondent's Reply to Complainant's Opposition to Respondent's Motion to Dismiss was received on May 17, 2004.

Respondent's Notice of Lodging of OSHA's Dismissal of Complainant's Complaint was received on May 20, 2004.

Discussion

The Sarbanes-Oxley Act states in pertinent part:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee - -

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of sections 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission or any provision of Federal law relating to fraud against

shareholders, when the information or assistance is provided to or the investigation is conducted by - -

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)

18 U.S.C. § 1514A (a)(1); see also 29 C.F.R. § 1980.102(a), (b)(1).

Title 18 U.S.C. § 1514A(b)(2) provides that an action under Section 806 of the Act will be governed by 49 U.S.C. § 42121(b), which is part of Section 519 of the Wendell Ford Aviation Investment and Reform Act for the 21st Century (the AIR 21 Act). Because of its recent enactment, the Sarbanes Oxley Act lacks a developed body of case law. As the whistleblower provisions of Sarbanes-Oxley are similar to whistleblower provisions found in many federal statutes, it is appropriate to refer to case authority interpreting these whistleblower statutes. Sarbanes-Oxley follows the AIR21 requirement that a complaint will be dismissed if it fails to make a prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. 29 C.F.R. §1980.104(b).

Complainant argues her complaint states a claim under the Act. Complainant contends she engaged in protected activity when she complained to management regarding the manipulation of line counts in its documents causing transcriptionists to lose income. The result, Complainant argues, was her unlawful termination. Complainant requests that Respondent's Motion to Dismiss be denied and Summary Judgment be granted in her favor. On the other hand, Respondent argues Complainant's complaint should be dismissed because Complainant did not engage in protected activity and the complaint and request for hearing were untimely. The undersigned agrees with Respondent and holds the complaint filed herein by the Complainant be dismissed for both failure to state a claim under the Act and failure to file a complaint and appeal in a timely manner.

Complainant failed to state a claim under the Act as she was unable to demonstrate that she engaged in protected activity. The undersigned is not persuaded by Complainant's argument that her complaints to Respondent, which allegedly resulted in her unlawful termination, constituted protected activity. Complainant failed to provide any evidence that her complaints to management raised violations of sections 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission or any provision of Federal law relating to fraud against shareholders. Rather, the evidence demonstrates the complaints concerned internal company policy as opposed to actual violations of federal law. Furthermore, violations of federal law were not raised until after Complainant's termination. Therefore, the undersigned finds Complainant failed to make a prima facie showing that she engaged in protected activity under the Act.

Alternatively, dismissal of the complaint is appropriate because the complaint and request for hearing were untimely. The Act requires that a complaint be filed within ninety (90) days of the alleged retaliation. 18 U.S.C. §1514A(b)(2)(D); 29 C.F.R. §1980.103(d); *Cunningham v. Washington Gas Light Co.*, 2004-SOX-14 (ALJ Apr. 2, 2004); *Walker v. Aramark Corp.*, 2003-SOX-22 (ALJ Aug. 26, 2003). Complainant was terminated by Respondent on September 19, 2003. A complaint would have been timely if filed by December 19, 2004. However, Complainant's complaint was not received by OSHA until December 30, 2002, 102 days after her termination. Clearly, Complainant is outside the 90 day prescriptive period rendering the complaint time barred on its face.

Furthermore, Complainant's request for hearing is untimely as well. To be effective, objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge within 30 days of receipt of the findings. 29 C.F.R. §1980.106. Complainant's determination letter, dated January 16, 2004, advised Complainant of the 30 day deadline within which to request a hearing and file objections. Consequently, Complainant ignored the 30 day filing requirement as she mailed her request for hearing on March 4, 2004. Therefore, Complainant's request for hearing is ineffective.

For the foregoing reasons, Complainant's complaint is dismissed.

ORDER

It is therefore **ORDERED** that the complaint filed herein by the Complainant be **DISMISSED** for failure to state a claim and failure to file a complaint and appeal in a timely manner.

A

Russell D. Pulver
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is

filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).